INDEX

CITATIONS

Cases:

Cases—Continued Page

Constitution, statutes and regulations:

Statutes—Continued. Page

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 2

JAMES MARCHETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 12

ANTHONY M. GROSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

Both of these cases were argued last Term, and present closely related questions involving the constitutional validity of the federal wagering tax laws (26 U.S.C. 4401 *et seq.*). *Marchetti* involves a conviction for failure to register and pay the fifty-dollar special occupational tax on persons engaged in the business of accepting wagers, as required by 26 U.S.C. 4411, 4412.[1] Certiorari was granted in *Marchetti* limited to the question whether "the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment," so that the Court, "especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), [should] overrule *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955)" (385 U.S. 1000). *Grosso* involves a conviction for failure to pay the ten-percent excise tax on wagers imposed by 26 U.S.C. 4401, in addi-

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[1] Certiorari was initially granted in *Costello* v. *United States* (383 U.S. 942). Petitioner Costello died in December 1966. On January 9, 1967, the Court granted certiorari in *Marchetti* (385 U.S. 1000), a companion case, and set it down for argument in lieu of *Costello*, which has been held in abeyance (No. 3, this Term). Because of the shortness of time before oral argument, and since the cases were virtually identical (petitioners in the two cases were tried and convicted together), the record and the government's brief in *Costello* were used in *Marchetti*. In both *Costello* and *Marchetti* the grant of certiorari was limited to the question of the constitutionality of the wagering tax provisions under the Fifth Amendment's privilege against self-incrimination.

tion to failure to pay the special occupational tax. Thus, the principal question presented for determination in *Grosso* is whether the excise tax on wagering violates petitioner's Fifth Amendment privilege against self-incrimination.[2]

On June 12, 1967, the Court restored these two cases to the docket for reargument this Term (388 U.S. 903, 904), and requested counsel to discuss, in addition to the question previously specified, the following questions:

In *Marchetti*:

> (1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U.S. 1, to the validity under the Fifth Amendment of the registration and special occupational tax requirements of 26 U.S.C. §§ 4411, 4412?
>
> (2) Can an obligation to pay the special occupational tax required by 26 U.S.C. § 4411 be satisfied without filing the registration statement provided for by 26 U.S.C. § 4412?

In *Grosso*:

> (1) What relevance, if any, has the required records doctrine, *Shapiro* v. *United States*, 335 U.S. 1, to the validity under the Fifth Amend-

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[2] A separate question, relating to the propriety of the trial judge's treatment of a note from the jury, was raised in the petition for certiorari in *Grosso*, and the Court's grant of certiorari was not limited to the self-incrimination issue (385 U.S. 810). We refer the Court to our previous brief for the government's position on this question (see Govt *Grosso* Br. 30-34), and include no further discussion of this point in the instant brief.

ment of the obligation to pay the wagering excise tax imposed by 26 U.S.C. § 4401?

(2) Is satisfaction of an obligation to pay a wagering excise tax imposed by 26 U.S.C. § 4401 conditioned upon the filing of a return required under 26 U.S.C. § 6011 and pertinent regulations? If it is not, what information, if any, must accompany the payment of a wagering excise tax obligation in order to extinguish the taxpayer's liability for that obligation?

Since our basic position in these cases rests essentially upon a common foundation, we treat both in this single brief. To the extent that there are differences which raise divergent considerations, we will make this clear in the course of our discussion. The instant brief is substantially limited to the questions specified in the Court's reargument orders, although we do attempt here to develop more extensively some of the points made previously. For a full development of the government's position and a discussion of the other aspects of the two cases, we respectfully refer the Court to our briefs filed last Term (herein referred to as "Govt *Costello* Br." and "Govt *Grosso* Br.").

SUMMARY OF ARGUMENT

The "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1, is not, in the government's view, directly applicable in the instant cases. That doctrine relates to records which are required to be kept as distinguished from reports which are required to be filed with the government. Such rec-

ords are not, as a general matter, directly testimonial, and cannot become incriminatory unless production is demanded and their contents analyzed. Reports—such as registration statements and tax returns—involve, on the other hand, an affirmative declaration of certain specified information and must be filed periodically, rather than simply maintained in the routine and ordinary course of conducting a business. *Shapiro* may relate to the daily record of wagers required to be kept under 26 U.S.C. 4403, but no such records are involved in the instant cases.

Shapiro is not wholly irrelevant here, however, since it stands for the proposition that, in appropriate situations, some accommodation between the government's need for information and the scope of the privilege against self-incrimination is proper. Self-reporting accompanied by some disclosure is a bedrock concept in our tax structure, and has considerable relevance in non-tax areas as well. A majority of this Court has consistently chosen the path of accommodation between the government's need for information and the privilege. The rationale of *Kahriger* and *Lewis*, properly considered, reflects such an accommodation, as do *Shapiro* and *Murphy* v. *Waterfront Commission*, 378 U.S. 52. Since an individual's entering into the gambling business is a matter of choice, there is nothing coercive about attaching federal tax conditions on his engagement in that business. The holding in *Albertson* is distinguishable since here the registration and return requirements serve a legitimate governmental interest sepa-

rate and independent from a concern with the underlying activity as such, and seek only a minimal amount of information necessary for the collection of taxes.

Gambling is a large-scale and thriving business in this country, although illegal in most places, and thus is a proper subject for excise taxation. Congress enacted the wagering tax as a revenue measure, and it has in fact produced a significant amount of revenue. Because Congress can properly tax gambling does not mean that it could similarly tax any and all illegal activities. Gambling is an ongoing and continuing business, is organized and run like other businesses, and has customers and employees—unlike sporadic criminal activities such as kidnapping and robbery.

The income tax situation involved in *United States* v. *Sullivan*, 274 U.S. 259, is doubtless distinguishable from the instant cases. Yet a challenge to the rationale of *Sullivan*, as spelled out in *Albertson*, is a predictable sequel to a decision overruling *Kahriger* and *Lewis*. Such a decision, if rendered, should therefore be predicated on a ground which will not impair the viability of *Sullivan*. If *Kahriger* and *Lewis* are not followed, adoption of a use-restriction rule, like that in *Murphy*, would achieve this result and would uphold the exercise of the taxing power while fully protecting the privilege.

No incrimination can result if information required to be disclosed cannot be used in a subsequent criminal prosecution. What we alternatively suggest is a rule prohibiting the use of any

compelled information, directly or indirectly, in a later prosecution, State or federal, relating to the underlying gambling activity made subject to the wagering tax. Such a rule would not amount to the judicial creation of an immunity statute. All that need be adopted in the instant cases is a use-restriction rule of narrow and limited applicability, since there is a clear governmental interest in obtaining the information, only a minimal disclosure is sought, and the governmental interest stems from the taxing power and does not reflect primarily a concern with the underlying activity involved. Under such a rule the privilege will be fully protected, for the burden will be on the prosecution to show an independent source for its information when it proceeds criminally against one who has complied with the wagering tax laws.

Finally, the government does not contend that the obligation to pay the special occupational tax and the wagering excise tax can be satisfied without filing the required registration statement and tax return. This approach is required by the pertinent statutory provisions, and reflects the current Treasury regulations and administrative practice. Enforcement of any tax measure necessitates the obtaining of a certain amount of information about those subject to the tax. The minimal amount of information sought under the wagering tax statutes is essential to the collection of the prescribed taxes.

ARGUMENT

I. The Government Does Not View the "Required Records" Doctrine of *Shapiro* v. *United States* as Directly Applicable in the Instant Cases.

In *Shapiro* v. *United States*, 335 U.S. 1, this Court held that a wholesale fruit and produce dealer, licensed to do business under the Emergency Price Control Act, and required by O.P.A. regulations to keep records of business activities "of the same kind as he has customarily kept" prior to the adoption of such regulations, could be compelled to disclose these records pursuant to a subpoena *duces tecum* even though they might tend to incriminate him of violating the price control law. Shapiro's conviction for violation of the price regulations, based in part upon evidence obtained from his business records, was thus sustained by the Court. In rejecting the argument that its holding would result in the compelled production of self-incriminatory evidence in violation of the Fifth Amendment, the Court pointed out that, while "there are limits which the Government cannot constitutionally exceed in requiring the keeping of records" (335 U.S. at 32), those limits had not there been exceeded. It concluded "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established'" (*id.* at 33). Production of the records involved in *Shapiro* could be compelled,

consistent with the Fifth Amendment, because of their relationship to the regulatory power embodied in the Emergency Price Control Act and the pertinent regulations adopted under that legislation. *Shapiro* holds, therefore, that the legitimate exercise of a regulatory power by the government may result in certain documents being regarded as outside the scope of the privilege against self-incrimination.

Nevertheless, we do not regard the "required records" doctrine for which *Shapiro* stands to be of direct relevance in the instant cases. In one of our briefs last Term we stated that, on the facts of that case, there was no need to consider "any possible relationship between the privilege against self-incrimination and the so-called 'required records' doctrine" in the wagering tax context (Govt *Costello* Br. 25, n. 24).[3] We believe that position to be the correct one, and do not contend that *Shapiro* has direct application to the situations presented in the instant cases. *Shapiro* deals with the maintaining of records, not

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[3] In its single opinion in the *Costello* and *Marchetti* cases (reported at 352 F.2d 848), the Second Circuit stated that it was "not required to consider other arguments on which the Government might rely, such as * * * the required records doctrine, see *Shapiro* v. *United States*, 335 U.S. 1 (1948) * * *" (*Costello* R. 21). Similarly, no mention was made of *Shapiro* in the Third Circuit's opinion in *Grosso* (reported at 358 F.2d 154; see *Grosso* R. 127-128). And, as petitioners point out, the Court in *Albertson* made no reference whatever to *Shapiro* in the course of its opinion (*Grosso* Rearg. Br. 13; *Marchetti* Rearg. Br. 16). See Mansfield, *The Albertson Case: Conflict between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Sup. Ct. Rev. 103, 114 (hereinafter "Mansfield").

the filing of returns or registration statements. Properly considered, in our view, the "required records" doctrine does not deal with *reports* which are required to be filed with the government and which entail an affirmative declaration of certain specified information, as distinguished from *records* which are required to be kept incident to a tax or regulatory program and which are subject to governmental inspection. Tax returns and registration statements may have certain "public aspects" (335 U.S. at 34), but they must be filed, not maintained, and hardly relate, in any necessary way, to transactions which "could lawfully [be] engage[d] [in] solely by virtue of the license granted * * * under the [pertinent regulatory] statute" (*id.* at 35).[4] *Shapiro* involved essentially those types of records which are regularly and customarily kept, pursuant to statutes or regulations, in the routine and ordinary course of conducting a certain business.[5] Such records are not, as a general matter, directly testi-

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[4] In his dissent in *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, Mr. Justice Douglas pointed to the distinction we view as pertinent in this regard. He stated (*id.* at 179-181): "The compiling, the signing, and the filing of the registration statement required of officers, directors, and others by the registration form is a form of elicited testimony, not the surrender of pre-existing records. * * * The cases dealing with the duty to keep records (see *Shapiro* v. *United States*, *supra*) can be put to one side. * * * Where individuals compile and sign the registration statement, as they must, it is the very making of the registration statement that will incriminate them, not the underlying documents."

[5] In fact, the pertinent regulation in *Shapiro* called for the maintaining of "records of the same kind as [the regulated business] has customarily kept" (335 U.S. at 5, n. 3).

monial in the way that registration statements and tax returns are, and cannot become incriminatory unless production is demanded and their contents analyzed. Nor are they closely akin to reports whose periodic filing, on government-provided forms, is required, and which, but for that requirement, would not otherwise be prepared. Some such reports, like the registration statement involved in *Albertson* (see 382 U.S. at 77-78), can, by virtue of the information required to be provided, be directly incriminating.

More analogous to the kind of records dealt with in *Shapiro* is the "daily record showing the gross amount of all wagers" required to be kept by one engaged in the business of accepting wagers, pursuant to 26 U.S.C. 4403.[6] But no such records were ever sought from petitioners in these cases; nor were they charged with failing to keep such records or with refusing to permit inspection of them. Moreover, the validity of the requirement of Section 4403 was never raised or passed upon by any of the courts below. Thus, in the instant cases, there is no issue before the Court as to records of that type.[7] In an

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[6] In addition to the requirement of Section 4403, 26 U.S.C. 4423 provides for the inspection of "the books of account of any person liable for" the payment of the federal wagering tax, and 26 U.S.C. 6001 requires persons liable for any tax to "keep such records" as may by regulation be prescribed (see *Grosso* Rearg. Br. 12).

[7] Presumably, it was for similar reasons that the Court made only a passing reference to *Shapiro* in its *Kahriger*

appropriate case the question of the applicability of the "required records" doctrine to the Section 4403 requirement may of course be raised, but that question is not presented here.[8]

In sum, therefore, our answer to the Court's first questions in the reargument orders in these two cases is that the "required records" doctrine of *Shapiro* has no direct bearing upon the registration and return requirements of the wagering tax laws.

II. *Kahriger* and *Lewis* Strike a Proper Balance Between the Privilege and the Power to Tax

That we take this view as to the applicability of the "required records" doctrine does not mean, however, that we regard the underlying rationale of *Shapiro* wholly irrelevant in the instant cases. Although we draw a distinction between reports required to be made and records required to be kept and conclude that the holding in *Shapiro* governs only the latter, that case does stand for the proposition that the Fifth Amendment's privilege against self-incrimination is not an absolute and that some accommodation is proper between the government's need for in-

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opinion (345 U.S. at 33, n. 13), and no mention of the "required records" doctrine in *Lewis* (compare *Marchetti* Rearg. Br. 17).

[8] Both petitioners take the position that *Shapiro* is of no direct relevance in the instant cases (see *Grosso* Rearg. Br. 7; *Marchetti* Rearg. Br. 14). As to the inapplicability of *Shapiro* to reports, as distinguished from records, see generally *Russell* v. *United States*, 306 F.2d 402, 410-411 (C.A. 9); *United States* v. *Ansani*, 138 F. Supp. 451, 453-454 (N.D. Ill.); see also *Curcio* v. *United States*, 354 U.S. 118.

formation and an extension of the privilege to its utmost potential limits.[9] Indeed, both petitioners concede that the *Shapiro* doctrine sanctions some inroads on the potential scope of the privilege (*Grosso* Rearg. Br. 18-19; *Marchetti* Rearg. Br. 15-18).

Taxation in this country has traditionally been, in essence, a self-assessing and self-reporting system. This self-reporting is generally accomplished through the filing of tax returns. Similarly, registration provisions have long antecedents in the tax field (see Govt *Costello* Br. 9-10). Voluntary compliance accompanied by some degree of disclosure is indeed fundamental to the administration of the Nation's tax system. That concept—a bedrock of our tax structure—has considerable and growing relevance in other regulatory fields as well, and is essential to the government's effective performance of its role in modern society.[10]

Reconciliation of the government's need to acquire and use information—in an age of many, large-scale governmental programs whose administration would be impossible without an extensive amount of voluntary compliance and self-reporting—with the constitutional protection against compelled disclosure of incriminating information of a testimonial nature is hardly an easy task. Striking the balance heavily in favor of either the government or the individual

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[9] See Comment, 65 Colum. L. Rev. 681, 682 (1965).

[10] See Govt *Costello* Br. 13, n. 11, for a listing of a few of the businesses and individuals from which disclosures are required under exercises of federal regulatory power.

would be undesirable and would have disruptive and unfortunate consequences. A majority of this Court has consistently chosen the path of accommodation. *Shapiro* is representative of one form of such accommodation. So is the rule of *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79, which provides the primary basis for our suggested alternative rationale in the instant cases—that of a use-restriction rule similar to that fashioned by the Court there (see Govt *Costello* Br. 17-25; Govt *Grosso* Br. 18-28). Even more recently, in *Schmerber* v. *California*, 384 U.S. 757, 762, the Court pointedly stated that "the privilege has never been given the full scope which the values it helps to protect suggest."

Kahriger and *Lewis*, properly considered, make a like accommodation between the demands of the Fifth Amendment and the needs of the government for information.[11] The registration and return require-

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[11] As stated in the concurring opinion of Mr. Justice Jackson in *Kahriger* (345 U.S. at 34-35): "[W]e deal here with important and contrasting values in our scheme of government, and it is important that neither be allowed to destroy the other. * * * Extension of the immunity doctrines to the federal power to inquire as to income derived from violation of state penal laws would create a large number of immunities from reporting which would vary from state to state. Moreover, the immunity can be claimed without being established, otherwise one would be required to prove guilt to avoid admitting it. Sweeping and undiscriminating application of the immunity doctrines to taxation would almost give the taxpayer an option to refuse to report, as it now gives witnesses a virtual option to refuse to testify. The Fifth Amendment should not be construed to impair the taxing power conferred by the original Constitution, and especially by the Sixteenth Amendment,

ments serve a governmental interest separate and independent from an interest in the underlying activity as such, and seek only the minimal amount of information necessary for the collection of taxes. The holding in *Albertson* thus does not require the overruling of *Kahriger* and *Lewis* (see Govt *Costello* Br. 15-17). Not only did the Court refer in those cases to the prospective nature of the registration requirement; [12] it pointedly stated that, since an individual's entering into the business of gambling is a matter of choice, there is nothing coercive about attaching a condition on his engagement in that business—that he comply with the federal tax laws (348 U.S. at 422-423).[13]

Reluctance to accept the *Kahriger-Lewis* rationale as a viable accommodation between the privilege and the government's need for information stems in large part, we submit, from the view that the wagering tax is not a "good-faith revenue measure" (345 U.S. at 35, concurring opinion of Mr. Justice Jackson; see also dissenting opinion of Mr. Justice Frankfurter, 345 U.S. at 37, 40). As noted in our *Costello* brief (pp. 11-12, n. 8), because of the Court's limited grant of certiorari we assumed that the validity of the wagering tax as a tax was not at issue in the instant cases. However, the question has been repeatedly al-

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further than is absolutely required." See also *James* v. *United States*, 366 U.S. 213; *Rutkin* v. *United States*, 343 U.S. 130.

[12] See Mansfield 153, 156-158.

[13] See Govt *Costello* Br. 12-15; Govt *Grosso* Br. 16-18; see also the discussion *infra*, pp. 22-24.

luded to by petitioners,[14] and deserves some comment.

An assumption which seems frequently to be made in this regard is that, if Congress can validly tax gambling, it could also exercise the taxing power against the "kidnapper" or "robber" by the simple expedient of terming such activities a "business". That assumption is not well founded. A business surely does not cease to be such merely because it is illegal. Liquor was a business subject to a federal tax during prohibition;[15] gambling is a business subject to such a tax now. This is how Congress regarded it when it enacted the wagering tax statutes. As we pointed out in our *Costello* brief (p. 9), the principal purpose of the wagering tax—as with other excise taxes enacted at the same time—was to help meet the exigent revenue requirements posed by the Korean War. This purpose is plainly confirmed by the pertinent legislative history (see Govt *Grosso* Br. 11-12). By its very nature, gambling has all the ap-

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[14] *E.g.*, *Marchetti* Rearg. Br. 12; *Grosso* Rearg. Br. 18. Petitioner Marchetti, while stating at one point that the ten-percent excise tax is roughly equivalent to the amount generally realized as the margin of profit on illegal gambling in this country (*Marchetti* Rearg. Br. 8), somewhat inconsistently notes, several pages later (*id.* at 10, n. 6), that the pertinent Treasury regulations expressly contemplate the passing on of the tax to, and thus, in effect, its collection from, those placing the bets (Treas. Reg. 44.4401-1(2)(iv)).

[15] See *United States* v. *Constantine*, 296 U.S. 287, 293, where the Court stated: "It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise."

pearances of an ongoing business. Its continuity of operation and organizational makeup—from an executive hierarchy to a staff of regularly paid employees who keep records and perform other clerical functions (see *United States* v. *Calamaro*, 354 U.S. 351, 353-354)—give it the earmarks of many other businesses. In recommending adoption of the statutes here involved the congressional committees pointed out: "Commercialized gambling holds the unique position of being a multi-billion-dollar, Nation-wide business that has remained comparatively free from taxation by either State or Federal Governments. The relative immunity from taxation has persisted in spite of the fact that wagering has many characteristics which make it particularly suitable as a subject for taxation." See H. Rep. No. 586, 82d Cong., 1st Sess., p. 55; S. Rep. No. 781, 82d Cong., 1st Sess., p. 113; see also 97 Cong. Rec. 12231-12243.

It may have been naive for the Congress which passed the wagering tax provisions as a revenue measure to assume that people who violate State law would voluntarily comply with federal law and pay the tax due—then estimated to amount to some $400 million annually. Perhaps with more funds the measure could be more effectively enforced and produce more revenue.[16] Be that as it

[16] See Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 87th Cong., 1st Sess., Pt. I, pp. 95, 98-99, 105 (testimony of Commissioner of Internal Revenue Caplin). Commissioner Caplin estimated that the wagering tax laws, if fully complied with, would bring in almost $5 billion annually (*id.* at 98).

may, Congress certainly could understandably conclude that the gambling business should be as much subject to taxation as, for example, the selling of jewelry and that excise taxes should be collected from those engaged in that business. Considerable deference should be given to that congressional determination. Not only was the wagering tax enacted as a revenue measure; the fact is that it has produced, and does produce, a significant amount of revenue (over $100 million since its enactment in 1951),[17] although the yield has been much less than was originally anticipated.

Nor—as this Court has frequently held in situations where the potential for revenue is significantly

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[17] In a letter filed with the Clerk of this Court subsequent to the argument of the instant cases last Term, the government noted that the total amount of revenue derived from the wagering taxes from 1952 through 1966 was about $106 million (letter of Solicitor General of January 23, 1967). In that letter it was stated that the estimated cost of enforcing the wagering tax laws during that period, including both Internal Revenue Service costs and Justice Department costs incident to prosecutions, was approximately $27 million. Petitioner Marchetti apparently challenges that figure, and points out that the I.R.S. costs listed included only those of the Intelligence Division (*Marchetti* Rearg. Br. 12, n. 8). However, we noted in that letter (p. 2) that enforcement of these laws "is primarily handled by the Intelligence Division" of the I.R.S., and pointed out that the estimated figures provided did not include overhead (which would exist without the wagering tax) or "the cost of relatively minor clerical [and] record-keeping tasks performed by other divisions of the Internal Revenue Service" (*ibid.*). We still regard the figures provided to reflect approximately the total cost of enforcing the wagering tax laws during the relevant period.

less [18]—does it militate against the validity of the tax as a tax that total enforcement might discourage persons from going into the gambling business. As this Court said some 100 years ago in the *License Tax Cases* (5 Wall. 462, 473):

> There is nothing hostile or contradictory * * * in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of

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[18] See, *e.g.*, *McCray* v. *United States*, 195 U.S. 27 (tax on oleomargarine); *United States* v. *Doremus*, 249 U.S. 86 (narcotic drugs); *Nigro* v. *United States*, 276 U.S. 32 (same); *United States* v. *Sanchez*, 340 U.S. 42 (marihuana); *Sonzinsky* v. *United States*, 300 U.S. 506 (firearms); *United States* v. *Stafoff*, 260 U.S. 477 (liquor); *United States* v. *One Ford Coupe*, 272 U.S. 321 (same). Although these decisions dealt, in terms, with Tenth Amendment and due process claims, they apply as well, in our view, to challenges to federal excise taxes resting on Fifth Amendment grounds—particularly in light of the fact that this Court was obviously aware of the potential Fifth Amendment issue when it decided a number of these cases. See Govt *Grosso* Br. 7-12.

Moreover, at least as to the cases dealing with the excise taxes on businesses made illegal under federal law (*e.g.*, *Stafoff*, *Doremus*, *Nigro*, *Sanchez*, *One Ford Coupe*), no dual sovereignty considerations could be urged as indicating that a Fifth Amendment question was irrelevant, as might be suggested with regard to situations where the *States* declared illegal the business subjected to the federal taxing power. Cf. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 63-77; see Govt *Costello* Br. 15, n. 14; see generally Govt *Grosso* Br. 8-10.

> the State to be a justification for the violation of the laws of the Union.

As phrased in the reports of the congressional committees recommending adoption of the wagering tax laws:

> * * * [P]roposals for a Federal tax on wagering are sometimes criticized as in effect sanctioning the carrying on of gambling activities in violation of [State] laws. The committee does not share this view. Since its inception, the Federal income tax has applied without distinction to income from illegal as well as legal sources, and it has never been generally supposed that such application carried with it any implied authorization to carry on illegal activities.* * * [19]

Nor does it follow that if the provisions involved in these cases are held valid, Congress, with equal constitutional authority, could adopt legislation imposing a tax on kidnappers and robbers requiring them to register and reveal their criminality under the theory that it was merely taxing "business" activities. In Mr. Justice Holmes' phrase, "Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo* v. *Wirth*, 170 Mass. 596, 600. As we have indicated, gambling is in fact a large-scale

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[19] H. Rep. No. 586, 82d Cong., 1st Sess., p. 55; S. Rep. No. 781, 82d Cong., 1st Sess., p. 113; see also Govt *Grosso* Br. 26-27, discussing petitioner Grosso's contentions regarding 26 U.S.C. 4422, which provides that compliance with the wagering tax laws "shall not exempt any person from any penalty provided" by federal or State law for engaging in the underlying activity whose proceeds are taxed (see the discussion *infra*, p. 32).

and thriving business, even if an illegal one in most States. It is run like a business; it has customers and employees; it is continuing and ongoing in nature, and, more often than not, a joint and collective endeavor. Most gamblers, of necessity, maintain detailed and elaborate books and records. Some of the aspects of gambling, from the earliest times, have been held to be a proper subject of taxation. See the *License Tax Cases, supra.*

Kidnapping and robbery, on the other hand, have no such characteristics or history. They are sporadic activities with no clearly defined uniformity or continuity of operation. A robber or "gang" of robbers conveys an entirely different concept than a business-like organization geared to accept wagers. The robber sells no services. His "gang" is usually no more than a loosely knit combination which is dissolved at the completion of the crime, to be reformed in time for the next crime, if at all. Furthermore, crimes like robbery and kidnapping are universally condemned criminal acts which have never been the subject of the taxing power and from whose perpetrators there would not be even a remote chance of collecting substantial amounts of revenue. In such circumstances, to impose a tax would be nothing more than to impose an additional criminal penalty. Cf. Mansfield 129-130. Not so with respect to gambling, however, which is neither *malum in se* nor universally prohibited.

If the Court accepts the view that the wagering tax provisions constitute a valid exercise of the constitutional power to tax and should be vindicated even

though an ancillary consequence may be some disclosure of otherwise potentially incriminating information, it should of course reject petitioners' attack upon *Kahriger* and *Lewis*. We have discussed these cases in detail in the *Costello* (pp. 12-17) and *Grosso* (pp. 16-18) briefs filed last Term. At this juncture, we wish only to re-emphasize what we regard as the underlying rationale of those decisions.

We read *Kahriger* and *Lewis*, properly considered, as epitomizing the self-reporting concept here discussed (*supra*, pp. 13-15), and as embodying a realistic accommodation with Fifth Amendment guarantees. Taxation is a normal—one might, perhaps, say inevitable—incident of business activity. The gambling business is not entitled to special status because it is, in most places, an illegal business. One does not have to accept wagers in a professional capacity nor run the risk of the criminal sanctions which might flow from that activity. A potential gambler knows that he is required to comply with a federal tax measure which might enhance the chances that his conduct will come to the attention of prosecuting authorities.[20]

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[20] *Kahriger* and *Lewis* hold that if the prospective gambler determines to proceed in the gambling business, he must be regarded as having voluntarily assumed the conditions placed thereon by the federal tax laws—that he must register, file returns and pay the prescribed taxes. This analysis does not lead to the conclusion that the would-be burglar, for example, cannot claim the privilege since he is free to choose whether to commit the burglary or not. Unlike the prospective burglar, the would-be gambler knows, before he engages in gambling, not only that gambling may be unlawful under State or local law—he also knows that it is a business to which Congress has attached certain tax burdens. As to the substantive

If, in view of these known tax requirements, he nevertheless decides to enter the gambling business, it would seem wholly incongruous for him to be immune from the federal excise tax and the related requirements (or, alternatively, that in order to tax the business Congress must make it legal). Compare the *License Tax Cases, supra.* In such circumstances, a viable approach, as the Court reasoned in *Kahriger* and *Lewis,* is to treat the decision to enter the business as the equivalent of a non-compelled choice in terms of Fifth Amendment rights. Federal taxation, in other words, is a known condition of engaging in the gambling business, with whatever that might entail for the individual gambler.[21] So viewed, the decision to gamble is a voluntary one and accordingly lacks the crucial element of compulsion—the basic danger against which the privilege protects.[22] As the Court

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offense, he stands in the same situation as the would-be burglar; as to the tax obligations, however, he does not—they are conditions attached to his engaging in the business, whether it is lawful or not. This does not mean that any activity is a proper subject for taxation (see the discussion *supra,* pp. 20-21). Nor does it mean that Congress can tax activities because and only insofar as they are unlawful. *United States* v. *Constantine,* 296 U.S. 287 (see Govt *Costello* Br. 12, n. 10; Govt *Grosso* Br. 10, n. 6).

[21] Petitioners repeatedly seek to analogize (*e.g., Grosso* Rearg. Br. 14-15) between gamblers required to comply with the wagering tax laws and witnesses called to testify. But, unlike the witness called upon to testify before a grand jury or an investigative body, who cannot generally choose to appear or not, the prospective gambler can choose to gamble or not to gamble (see also the discussion in note 25, *infra*).

[22] While it is true that the Court—particularly in *Kahriger*—emphasized the prospective nature of the registration and

said in *Lewis* (348 U.S. at 422-423):

> The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

Despite petitioners' protestations to the contrary (*e.g.*, *Marchetti* Rearg. Br. 13), the predictable sequel to these cases, if *Kahriger* and *Lewis* are overruled, is an attack upon the rationale of *United States* v. *Sullivan*, 274 U.S. 259. As stated in our *Costello* (pp. 22-23, n. 21) and *Grosso* (p. 11, n. 8) briefs last Term, we regard the income tax situation involved in *Sullivan* as distinguishable from the matters involved here—registration and excise tax requirements relating to those engaged in a business which, in one form or another, is unlawful in all but one of the States, and some of the interstate aspects of which are made criminal under federal law. Income tax returns contain questions "neutral on their face and directed at the public at large [and not] * * * at a highly selective group inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79. We recognize further that these differences are not insubstantial and that an accommodation of the power to tax *income* with

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occupational tax (see 345 U.S. at 32-33), the broader implication of both rulings was that there is no compulsion within the purview of the Fifth Amendment in the requirement that one comply with the wagering tax laws. See Govt *Grosso* Br. 17-18.

Fifth Amendment guarantees would not be directly impaired by a holding that the provisions involved in the instant cases are constitutionally invalid.

Notwithstanding these differences, however, we point out that there is always some degree of collision between the Fifth Amendment and the exercise of the taxing power, since self-reporting, accompanied by some disclosure, is the traditional foundation of tax administration in this country. The taxing power and the privilege are both in the Constitution. When they collide, some accommodation must be made.[23] Here the contention, in essence, is that Congress cannot validly tax an activity that is unlawful under State law—because it is unlawful. What the gamblers will say in the subsequent case challenging *Sullivan* is that there is simply no effective way to avoid incrimination in reporting income from illegal sources—just as they say now that there is no way to comply with the wagering tax laws without incriminating themselves. Like the taxpayer in *Sullivan*, they seek in the instant cases to draw "a conjurer's circle around the whole matter" (274 U.S. at 264) by refusing to register and pay the tax at all. Upholding their contention here "would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim" (*Albertson* v. *Subversive Activities Control Board*, 382 U.S. at 79).[24] Yet that

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[23] See *Billings* v. *United States*, 232 U.S. 261, 282; see also Govt *Grosso* Br. 10.

[24] See Mansfield, 116-120, especially 117.

was a significant point of distinction noted by the Court between *Sullivan* and *Albertson*.

At all events, if the Court rejects the accommodation which *Kahriger* and *Lewis* reflect, we urge that an essentially narrow ground, which will maintain the distinction of the *Sullivan* situation set out in the *Albertson* opinion, be predicated for that result. Otherwise, the Court will undoubtedly be faced, several terms hence, with the claim that, *sub silentio*, it has overruled *Sullivan* and exempted gamblers from income as well as excise taxation. If *Kahriger* and *Lewis* are not followed, adoption of the use-restriction rationale which we have suggested and discussed at some length in our *Costello* (pp. 17-25) and *Grosso* (pp. 18-28) briefs, would avoid the hazard of casting a shadow on the viability of the *Sullivan* rationale.

III. Alternatively, a Use-Restriction Rule Should Be Adopted Instead of Holding the Wagering Tax Provisions Unconstitutional

As suggested immediately above, if the Court should decide that the illegality surrounding gambling makes it inappropriate, in light of *Albertson*, to uphold the *Kahriger-Lewis* rationale, it by no means follows that either the registration or excise tax provisions must fall as an unconstitutional exercise of congressional power. On the contrary, as we urged in some detail in our briefs in *Costello* (pp. 17-25) and *Grosso* (pp. 18-28) last Term, the proper remedy would be to limit the use of the information obtained from registration and the filing of an excise tax return to

federal tax purposes. It seems plain that no incrimination could result if the information disclosed is confined solely to tax uses (see Govt *Costello* Br. 17-19; Govt *Grosso* Br. 19). An individual can hardly be "a witness against himself" if what he is required to disclose cannot be used against him, directly or indirectly, in a subsequent criminal prosecution. A fair accommodation may thus be achieved by barring the use of that information as evidence, as a link in an evidentiary chain or as an investigatory lead, with respect to any criminal prosecution, State or federal, based upon the underlying gambling activity made subject to the wagering tax. This is neither a novel or unworkable doctrine. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 78-79; *United States* v. *Blue*, 384 U.S. 251, 255; *Adams* v. *Maryland*, 347 U.S. 179, 181; cf. *Ullmann* v. *United States*, 350 U.S. 422, 437.

Having already elaborated on these matters in our briefs last Term, we limit our present discussion to a response to the argument that the suggested rationale is an open-ended doctrine and, in practical effect, would be an impermissible judicial conferral of immunity which, if applied here, could logically be applied in any other circumstances to devitalize the basic right to remain silent (see *Marchetti* Rearg. Br. 26-28; *Grosso* Rearg. Br. 19-20.)

We urge no "across-the-board" application of the *Murphy* rationale. There is plainly no occasion or need to so hold in the instant cases. We urge only that where there is a clear governmental interest in the information sought, where only a minimal or

limited disclosure is required, and where the interest in obtaining the information is grounded on a legitimate exercise of a separate and independent governmental power, and not principally a concern with the underlying activity involved, a persuasive case can be made for applying a use-restriction rule like that adopted in *Murphy*. Indeed, a more convincing argument can be made for applying such a rule in the instant circumstances than in the situation presented in *Murphy*. These cases involve the fundamental and essential governmental power to tax. As already observed, inherent in the nature of the taxing power is a self-reporting and disclosure concept which, to some degree at least, collides with the full sweep of the privilege (see *supra*, pp. 13-14). Accordingly, even if the Court rejects the approach of *Kahriger* and *Lewis*, it would seem that, at least as to the taxing power, some accommodation with Fifth Amendment considerations is warranted.[25] The Court

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[25] Contrary to petitioner *Marchetti's* suggestion (Rearg. Br. 18, 26), we suggest no doctrinal distinction between oral testimony and writings insofar as the reach of the privilege is concerned. We recognize that the Court stated in *Albertson* that "if [an] admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes" (382 U.S. at 78). That statement, however, hardly constituted a *sub silento* overruling of *Shapiro*, as petitioner Marchetti intimates (Rearg. Br. 18); otherwise, the Court's treatment of *Shapiro* in *Spevack* v. *Klein*, 385 U.S. 511, 517-519 (see also Mr. Justice Fortas' concurring opinion, 385 U.S. at 520) is quite inexplicable (see note 33, *infra*), as are the references to *Shapiro* in the reargument orders in the instant cases. All that the gov-

thus need not choose between extremes; it may both preserve the taxing power and at the same time retain the essentials of the privilege—by adopting a use-restriction rule.[26] In short, it is the government's view that "by insulating the disclosure from prosecutory use, it may be possible both to preserve the essence of the privilege and at the same time give recognition to the government's interest in obtaining information for certain purposes." [27]

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ernment suggested last Term (see Govt *Grosso* Br. 12-16) is that meaningful differences among various types of governmental inquiries—without regard to whether oral or written responses are sought—should be regarded as relevant in evaluating the substance of privilege claims and in determining what sort of government-individual accommodation, if any, would be appropriate in this regard. An inquiry which focuses upon a particular individual, and subjects him to an in-depth probe of various aspects of his activities—and, at least potentially, to harassment, intimidation and humiliation—obviously may be viewed differently, insofar as the Fifth Amendment is concerned, than a limited inquiry seeking a minimal amount of information necessary for a tax or regulatory purpose and reflecting a governmental interest separate and independent from that in any particular individual's underlying conduct. See generally Mansfield 110-113, 135-138, especially 135.

[26] See Mr. Justice White's extensive discussion of this matter in his concurring opinion in *Murphy*, 378 U.S. at 92-107.

[27] Mansfield 121. Later in the same piece, it is stated (*id.* at 160, 166): "Sometimes it is well that the privilege bend in order that it not break. The essentials of the privilege are not necessarily sacrificed by requiring disclosure of information when the use to which it is put is controlled and limited. * * * [U]se of incriminating information for purposes other than prosecution will satisfy the reason for compelling disclosure. Advantage should be taken of this fact to reduce the conflict between the privilege and other governmental policies."

Whatever may be the outer limits of the *Murphy* rationale, the instant cases fall well within them. In *Murphy* the State's valid interest in obtaining a witness's testimony clashed with the claim that the witness would potentially be subject to prosecution under federal law. The Court reconciled the competing interests involved as follows (378 U.S. at 79):

> We conclude * * * that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity.

Similar conflicting interests are involved here. The federal interest in collecting revenue is a vital one, stemming from considerations wholly independent of

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Mansfield suggests that an approach in determining when some accommodation between the privilege and the government's need for information is appropriate might be grounded on 1) whether the information requirement exists solely for the purpose of detecting and prosecuting crimes, as an added penalty, or, instead, for some other legitimate governmental purpose, and 2) if the latter, whether that purpose can be achieved even though the information obtained is never used in connection with a criminal prosecution (*id.* at 141). Here the registration and return requirements exist to facilitate the collection of taxes, and that purpose can plainly be achieved although the information disclosed is limited to tax uses only.

the legality or illegality of the activity being taxed. Moreover, it is the fear of incriminating use of the information required to be disclosed in a State prosecution which here creates the basic tension between the taxing power and the privilege.[28]

Accordingly, as in *Murphy*, there is here an apparent inter-jurisdictional clash of policies. Nor is it a meaningful difference to say that here, unlike in *Murphy*, which involved State compulsion, Congress could have enacted an immunity statute barring State as well as federal prosecution of unlawful gambling activity. By the same token, the Court in *Murphy* could have upheld the claim that the State was without authority to compel the testimony and left it to Congress to fashion an immunity statute of sufficient breadth to protect against federal prosecution. This it did not do.[29] Instead—and for the express reason that the State had a vital interest in the exer-

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[28] Federal legislation, as noted in our *Costello* brief (p. 19, n. 17), prohibits only certain interstate aspects of gambling in specified circumstances. Hence, a person who operates a wagering business within a single State is in no apparent danger of federal prosecution as a result of paying the occupational and excise taxes and filing the required forms. And presumably under the *Sullivan* rationale, as interpreted in *Albertson* (382 U.S. at 79), if the gambling activity is carried on in more than one State, the defendant might refuse to note that fact on the forms that he files.

[29] While the Court set aside the judgment of civil contempt and remanded in *Murphy*, it did so because, at the time of the refusal to answer, that refusal was based on the correct view that the answers could be used in a criminal prosecution in the federal courts. The Court simply restored the parties to the status existing before the refusal (see 378 U.S. at 79-80; see also note 39, *infra*).

cise of its investigatory and law-enforcement functions—the Court there adopted a rule sanctioning the compulsion of needed information and prohibiting only its subsequent incriminatory use. The federal interest in securing information for tax collection purposes is patently of no lesser significance.

Moreover, when Congress adopted the wagering tax statutes in 1951, it had no reason to consider the implications of a Fifth Amendment claim in terms of a potential State prosecution. At that time, *Twining* v. *New Jersey*, 211 U.S. 78, holding the Fifth Amendment inapplicable to the States, stated the governing law (see Govt. *Grosso* Br. 27-28, n. 22). Moreover, there was then little federal legislation proscribing the interstate aspects of gambling. Hence, the fact that no mention was made of this matter in the debates or committee reports leading up to the adoption of the wagering tax laws simply reflects that, in light of the then-prevailing law, there was no sound reason for Congress to concern itself with any possible Fifth Amendment implications. And, while it is true that Congress provided that payment of the wagering taxes "shall not exempt any person from any penalty" under federal or State law for engaging in the activity being taxed (26 U.S.C. 4422), this was simply in recognition of the established principle that Congress does not have to legalize an unlawful business in order to tax it (see cases cited in note 18, *supra*). Inclusion of Section 4422 does not suggest a congressional preference for holding a taxing statute unconstitutional as opposed to application of a judicially framed exclusionary rule (see Govt *Grosso* Br. 26-27).

We stress—as we did in our *Grosso* brief last Term, (pp. 22-26)—that we are not in any way suggesting that the Court usurp the function of Congress and, in effect, adopt an immunity statute, prohibiting completely the prosecution of gamblers under State or federal law. On the contrary, and consistent with the holding in *Murphy*, our alternative argument advocates only the adoption of the rule that those authorities—State or federal—which institute a criminal prosecution of one who has complied with the wagering tax laws, relating to the underlying gambling activity, "have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence" (378 U.S. at 79, n. 18).

Nor do the practicalities of the situation preclude a showing of "an independent, legitimate source" in a subsequent gambling prosecution. As to the excise tax returns, there is little chance that they could be used as a prosecutorial lead, since the information that they require has minimal impeaching worth and the public disclosure provisions of 26 U.S.C. 6107 do not relate to such returns.[30] While the statutory disclosure provisions do relate to the registration and special occupational tax provisions, the obvious impact of the rule we alternatively urge will make it quite costly to a prosecutor who might seek to utilize such information. Simply stated, by doing so he will markedly increase his burden of showing an

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[30] See, however, Govt *Grosso* Br. 14, n. 10, as to the limited availability of such returns, in certain circumstances, to State and local officials.

independent source for his evidence and thereby imperil the success of his prosecution. Indeed, if a prosecutor has a sufficient basis to institute a gambling prosecution wholly apart from what may be learned as a result of the gambler's compliance with the wagering tax laws—which is usually the case where State and local gambling laws are effectively enforced—he would hardly be likely to endanger his case by recourse to any such "tainted" information. Should the Court adopt a use-restriction rule in the instant cases, representatives of the Internal Revenue Service intend to initiate steps seeking congressional amendment of Section 6107 so as to exclude the occupational tax on wagering from the broad class of special taxes presently subject to a degree of mandatory public disclosure under that provision. Pending the enactment of such an amendment, the I.R.S. would, as a matter of policy, caution prosecutorial officials concerning the impact of the use-restriction rule. Similarly, the I.R.S. would, as a practical matter, exercise discretion regarding the disclosure of wagering excise tax return information so as to facilitate conformity with that rule.[31] Under such an approach, disclosures of information reported on wagering tax forms would be used only to enforce the tax measure and collect revenues due thereunder to the government. This would help ensure that infor-

[31] We do not mean to suggest that, during the interim period before amendment of Section 6107, the existence of such an administrative policy will in effect satisfy the prosecutor's obligation of showing an "independent source" for his evidence and underlying information. On the other hand, it will not be wholly irrelevant in this regard.

mation disclosed incident to compliance with the wagering tax laws will be used only for tax purposes, and would leave the gambler "in substantially the same position" as if he had not been required to disclose that information (378 U.S. at 79).[32] And, apart from these considerations, there is no occasion at this juncture to deal with such essentially evidentiary issues, the resolution of which is indicated by those cases involving application of the "taint" doctrine, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 488 (see Govt *Costello* Br. 23-25; Govt *Grosso* Br. 28).

In sum, whatever may be the ultimate implications

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[32] We recognize that such a use-restriction rule might, in some situations, effectively prevent the prosecution of a person who has complied with the wagering tax laws for certain gambling violations. Where the defendant's identity is obtained through registration or the filing of a return, and an attempt is later made to prosecute him for the underlying activity, the information disclosed may be so crucial and the lead obtained so important that prosecution would be wholly prohibited, not merely the evidentiary use of the information disclosed (cf. the concurring opinion of Mr. Justice Harlan in *Murphy*, 378 U.S. at 91, n. 7). In other words, it is possible to conceive that the effect of such an investigatory lead may not be sufficiently attentuated so that it could be shown that the evidence sought to be introduced was obtained from sufficiently independent sources. That the suggested rule might possibly, in a limited class of situations, result in immunity from prosecution does not convert it into what is essentially an immunity rule. Such a situation would occur only infrequently, if ever, since the identity of those engaged in gambling is generally not a secret to most State and local law-enforcement officials. Application of the rule in this manner might simply be occasionally necessary to ensure that appropriate protection of the privilege is consistently accorded. Compare Mansfield 165.

of *Murphy*,[33] the rule there enunciated would seem

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[33] There is no merit to petitioner Marchetti's assertion (Rearg. Br. 26-27) that the Court's failure to apply a use-restriction rule last Term in *Spevack* v. *Klein*, 385 U.S. 511, undermines the reliance on such a suggested approach here. *Spevack* (in overruling *Cohen* v. *Hurley*, 366 U.S. 117) held only that a lawyer could not be disbarred for claming the privilege, where to have spoken might also have resulted in such disciplinary action, as well as in possible criminal prosecution. Indeed, there is a suggestion in Mr. Justice Fortas' concurring opinion in *Spevack* (385 U.S. at 519-520) that, if the "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1, had been applicable—which, the Court found, it was not on the facts of that case (see 385 U.S. at 517-518)—he might be compelled to affirm a disbarment order where an attorney refused to keep pertinent records or produce them. Especially significant, in regard to *Spevack*, is the fact that Mr. Justice Fortas, whose vote was needed for a majority, specifically stated that "[i]t is quite a different matter if the State seeks to use the testimony given [in disciplinary proceedings] under this lash [of discharge for failure to testify] in a subsequent criminal proceeding," referring to the companion *Garrity* decision (385 U.S. at 519-520) (emphasis added). This suggests a view of *Shapiro* as imposing a use-restriction rule, at least where criminal consequences might flow from a particular disclosure.

Moreover, in *Garrity* v. *New Jersey*, 385 U.S. 493, a companion case to *Spevack*, where the Court found a violation of the privilege in requiring a policeman to confess his criminal guilt under the threat that if he did not speak he would lose his job, the Court also intimated that it was adopting a use-restriction rule. See Note, 76 Yale L.J. 839, 847, n. 41 (1967); cf. *Spevack* v. *Klein*, 385 U.S. at 516, n. 3; see also the dissenting opinion of Mr. Justice White, 385 U.S. at 531-532. Indeed, the holding in *Garrity* was that the privilege "prohibits *use* in subsequent criminal proceedings of statements obtained under threat of removal from office * * *" (385 U.S. at 500) (emphasis added). Thus, the precise vice found there by the Court was not compulsion—but use—of potentially incriminating information.

plainly applicable to the instant cases, if *Kahriger* and *Lewis* are not followed. There is no need to strike down a taxing statute on Fifth Amendment grounds when a fair accommodation—embodied in a use-restriction rule—is available to sustain the federal authority in this crucial area and at the same time protect against any inroads on basic rights protected by the privilege against self-incrimination.

IV. The Government Does Not Contend That the Obligation to Pay the Special Occupational Tax and the Wagering Excise Tax Can Be Satisfied Without Filing the Required Registration Statement and Tax Return

As our foregoing arguments have emphasized, it is our view that the filing of prescribed reports—whether registration statements to accompany payment of occupational taxes, or returns to accompany payment of excise taxes—is essential to the workability of our self-reporting system of taxation. Moreover, this is so whether the Court reaffirms the rulings in *Kahriger* and *Lewis*, or adopts our alternatively suggested use-restriction rationale. We now turn more directly to the Court's second inquiry, as to the kind of information which, in the government's view, must be filed coincidentally with payment of the special occupational tax and the ten-percent excise tax on wagering. Since there are somewhat different considerations involved with regard to each of these tax obligations, we deal with them separately.

As to the registration statement involved in *Marchetti*, Congress made it plain that every person liable for the fifty-dollar occupational tax, under 26 U.S.C. 4411, "shall register" as provided for under

26 U.S.C. 4412. As we pointed out in our *Grosso* brief last Term (p. 14, n. 10), payment of the special occupational tax and registration are accomplished together through the filing of a single registration form (Form 11-C; contained in Govt *Costello* Br. App.). This form requires information, *inter alia*, as to the name, alias, or trade name (if any), address and location of the business of one who proposes to enter the wagering business and is therefore liable for the special tax. In our view, the minimal information thus requested is essential to a proper effectuation of the taxing power in the circumstances. Just as the payment of the special tax is an "integral part" [34] of the plan for collection of the excise tax on wagers, so the registration provisions are directly related to the enforcement and collection of both taxes. It unquestionably facilitates the collection of a tax on a business to have the person therein engaged specify his name, address and place of business and the names and addresses of the persons who carry on the business for him or for whom he carries on the business. This is particularly true of the gambling business, where there would otherwise be no independent information as to the place where the business is being conducted. Such elementary information is, as Congress recognized,[35] necessary for the collection of the

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[34] H. Rep. No. 586, 82d Cong., 1st Sess., p. 60.

[35] See, *e.g.*, S. Rep. No. 781, 82d Cong., 1st Sess., p. 118. As noted by petitioners (*Marchetti* Rearg. Br. 20; *Grosso* Rearg. Br. 23), several court decisions (*e.g.*, *United States* v. *Mungiole*, 233 F. 2d 204 (C.A. 3)) reflect that it is the Commissioner of Internal Revenue's policy not to accept

excise tax (see Govt *Costello* Br. 9-10, 16). Like other numerous registration provisions upheld by this Court, this provision is "obviously supportable as in aid of a revenue purpose." *Sonzinsky* v. *United States*, 300 U.S. 506, 513. In short, if the occupational tax is a lawful exercise of the taxing power, the registration requirement is a proper and necessary incident of that tax.

Similarly, as to the wagering tax return involved in *Grosso*, it is quite clear that it was the congressional judgment that a completed return form (Form 730, set out in Govt *Grosso* Br. App.) be filed along with payment of the ten-percent excise tax.[36] In our *Costello* brief last Term (pp. 22-23, n. 21), we suggested a possible distinction between the *filing* of a registration statement and a wagering tax return, and the *payment* of the wagering excise tax, noting that payment of that tax might be effectuated "through means not necessarily having an incrimina-

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payment of the occupational tax unless the taxpayer furnishes the information required on the registration form, and hold that a tendered but rejected payment is no defense to a subsequent non-payment prosecution. A similar policy obtains regarding payment of the ten-percent excise tax, *i.e.*, the prescribed form must accompany payment or the money is not accepted. In short, in the language of *Albertson* (382 U.S. at 78), "nothing in the Act or regulations permit less than literal and full compliance with the requirements" for filing the prescribed forms.

[36] Under 26 U.S.C. 6011 Congress has required that a return "shall" be filed, when so provided for by regulation. Under Treas. Reg. 44.6011(a)-1(a), a monthly tax return is required to be filed by those who must pay the wagering excise tax under 26 U.S.C. 4401.

tory potential." [37] On further reflection, however, we have concluded that an excise tax return must be filed along with and accompany payment of the tax. It is the considered judgment of the responsible administrative officials—and presumably Congress as well—that this is the only rational way in which such an excise tax can be effectively administered in an orderly fashion. At the very least, the name and address of the person paying the tax is essential to serve this end. If such information is required, there is no sound reason why the taxpayer should not also be required, in the monthly return, to list the gross amounts of wagering receipts upon which the tax is figured. In short, our answer to the Court's second questions in the reargument orders is that neither the obligation to pay the special occupational tax nor the wagering excise tax can be satisfied, in the govern-

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[37] We did note, in our *Grosso* brief last Term (p. 19, n. 14), that the appropriate return, or "at least some identification of the taxpayer," must be provided along with payment to permit effective tax administration. Form 730 is the return form currently prescribed for completion along with the required monthly payment of the wagering excise tax, and relates to that tax alone. There is no reason why, as an administrative matter, a general excise tax return form (such as Form 720, although that form is for a number of excise taxes required to be paid quarterly) might not be prescribed for the wagering excise tax, if the use of such a less specific and more neutral form would be regarded as having a significantly less incriminatory potential. Nevertheless, the return form presently prescribed and in use is Form 730, and it is our position that, under current regulations and practice, that form, properly filled out, must accompany payment of the ten-percent wagering excise tax.

ment's view, without the filing of the prescribed registration and return forms.[38]

CONCLUSION

For the reasons stated herein and in our briefs of last Term, the judgments of the courts of appeal should be affirmed in both the *Marchetti* and *Grosso* cases.[39]

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[38] Since we take the view that a return form must accompany payment of the wagering excise tax, there is no occasion to consider the second part of the Court's second question in its reargument order in *Grosso* (see *supra*, p. 4).

[39] For a discussion of the reasons why, in our view, the convictions here should be affirmed even if the Court declines to adhere to *Kahriger* and *Lewis* and instead adopts our suggested use-restriction approach, we refer the Court to our briefs of last Term in *Costello* (pp. 25-26) and *Grosso* (pp. 28-29).

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